Supreme Court, U.S.
FILED
OCT 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-408

In The

Supreme Court of the United States

October Term, 1986

JOHN DONALD MASSOUD,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JEFFREY B. KECK
Assistant District Attorney
Appellate Section
Counsel of Record

Dallas County District Attorney
Dallas County Government Center
600 Commerce Street
Dallas, Texas 75202-4606
214-749-8910

October 8, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

27pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

LIST OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR NOT GRANTING THE WRIT 8

I. The Court of Appeals correctly concluded that the allegedly "exculpatory evidence" tendered by the prosecutor to the trial court was not material to Petitioner's defensive theory and that the facts which would have been established by such evidence were before the jury from another source. Because of the immateriality of the evidence in question, the instant case is an improper vehicle for a resolution of any "conflict" between the circuits, if such conflict exists, in that the Court of Appeals' legal conclusions are not in conflict with any known principles of constitutional law. 8

II. The Court of Appeals correctly decided the Petitioner's double jeopardy claim on State procedural grounds. Even if this basis for the decision below was incorrect, the facts of the case clearly show that the trial court did not abuse its discretion in holding that the jurors in question were disabled, and therefore, "manifest necessity" required the termination of Petitioner's first trial. Accordingly, Petitioner's double jeopardy rights were not violated in the instant case. 11

TABLE OF CONTENTS—Continued

Page

III. The Petitioner's ineffectiveness of counsel claim does not even facially present a federal question since Petitioner does not attempt to demonstrate that the ineffectiveness of counsel reulted in any actual "prejudice" to the Petitioner as that term is defined in *Strickland v. Washington.* 14

CONCLUSION 16

APPENDIX ..... App. 1

LIST OF AUTHORITIES

Page

CASES:

Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1979) 3, 13, 14, 15

Brady v. Maryland, 373 U.S. 93, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) 6, 8, 9

Hameed v. Jones, 750 F.2d 154 (1st Cir. 1984), cert. denied, 105 S.Ct. 2677, 86 L.Ed.2d 695 13

Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965) 12

Illinois v. Sommerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973) 13

Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985) 10

Robinson v. Wade, 686 F.2d 298 (5th Cir. 1982) 12

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 14, 15

Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969) 12

United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) 9, 11

United States v. Bagley, 473 U.S. —, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) 10, 11

STATUTORY PROVISIONS:

28 U.S.C. § 1257(3) 2

TEX. CODE CRIM. PROC. ANN. art. 27.05 (Vernon Supp. 1985) 12

TEX. CODE CRIM, PROC. ANN. art. 36.29 (Vernon Supp. 1986) 2, 13

TABLE OF AUTHORITIES—Continued

Page

TEX. CODE CRIM. PROC. ANN. art. 36.33 (Vernon 1981) 2

TEX. PENAL CODE ANN. § 15.03 (Vernon 1974) 2, 3

TEX. PENAL CODE ANN. § 29.02 (Vernon 1974) 2

TEX. PENAL CODE ANN. § 29.03 (Vernon 1974) 2, 3

MISCELLANEOUS:

Sup. Ct. R. 34.2 2

Fed. R. Crim. Proc. 12(b) 12

No. 86-408

In The

Supreme Court of the United States

October Term, 1986

JOHN DONALD MASSOUD,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

The State of Texas, Respondent, by and through her Criminal District Attorney, files this brief in opposition to theh petition for writ of certiorari (hereinafter "petition") filed herein by John Donald Massoud, Petitioner. The petition was received by Respondent on September 10, 1986.

OPINION BELOW

Petitioner's recitations respecting the opinion of the Court of Appeals for the Fifth Supreme Judicial District

of Texas, and the denial of Petitioner's subsequent petition for discretionary review by the Court of Criminal Appeals of Texas are correct. *See* Rule 34.2 of the Rules of this Court. The opinion of the Court of Appeals is set forth in the Appendix of the petition and is not duplicated in this brief.

JURISDICTION

The Petitioner's factual recitations regarding jurisdiction are correct, as is the recitation that 28 U.S.C. § 1257 (3) confers jurisdiction upon this Court to hear cases involving a constitutionally protected "title, right, privilege, or immunity."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Although Petitioner has set forth the relevant constitutional provisions and *some* relevant Texas substantive and procedural statutes in his Appendix, Petitioner has omitted a reference to the following State statutes:

TEX. CODE CRIM. PROC. ANN. arts. 36.29 and 36.33
TEX. PENAL CODE ANN. §§ 15.03, 29.02 and 29.03.

These statutes are set forth in the Appendix of this brief.

STATEMENT OF THE CASE

Petitioner was charged by indictment (R.I-3) with the offense of criminal solicitation, conduct proscribed by TEX.

PENAL CODE ANN. § 15.03 (a) (Vernon 1974). The felony solicited by the petitioner was aggravated robbery.[1]

The Petitioner's first trial was terminated on the morning of July 6, 1983, when, after the trial had been impaneled and sworn and the Appellant had entered a plea of not guilty, the trial court determined that two jurors had become disabled. The trial court then declared a mistrial. Juror Tadesa advised the trial court that she had suffered from depression in the past, that over night she had become aware that serving on the jury was aggravating her emotional anxiety and that her anxiety would prevent her from functioning as a juror. Both parties declined opportunities to examine to Tadesa and the trial court then excused Tadesa over Petitioner's general objection. The trial court found that Tadesa's mental condition rendered her "incapable of serving on the jury." (R.II-23-24). A second juror, Luckett, then testified that early in the morning that he had learned that his brother had committed suicide and that it would be better for all concerned if he were off the jury. The trial court weighed the choice between excusing Luckett temporarily or excusing him permanently and declaring a mistrial. The petitioner did not object to Luckett being found temporarily disabled. However, after the trial court decided to excuse Luckett permanently, the Appellant objected to the trial court's declaration of a mistrial. Pursuant to this Court's recommendation in *Arizona v. Washington*, 434 U.S. 497, 519, 98 S.Ct. 824, 836, 54 L.Ed.2d 717 (1979), the trial court entered a written order declaring mistrial and stating its reasons therefore. (R.I-28).[2]

---

[1] Conduct proscribed by TEX. PENAL CODE ANN. § 29.03(b) (Vernon 1974).

[2] A copy of the written order of the trial court is attached to the Appendix of this brief.

On October 3-6, 1983, a second trial before a jury was had on the petitioner's plea of "not guilty." Petitioner was convicted by the jury and the punishment issue was submitted to the trial court which assessed punishment at seven years confinement in the Texas Department of Corrections. (R.I-49-51).

Basically the State's evidence demonstrated that during April of 1982, the petitioner had had several meetings with Dallas Police Sergeant Hugh Amos who had held himself out to Petitioner as a "hit man" and professional arsonist. Petitioner informed Amos that Petitioner's former business partner, Bill Seifert, had cheated him in connection with the operation and sale of an auto glass business the Appellant had sold to Seifert. Petitioner promised to pay Amos $13,000 if Amos would blow up the auto glass shop owned by Seifert and rob and severely beat Seifert. (R.IV-146-170).[3] The State introduced tape recordings of all these conversations after Petitioner had specifically waived any objection to them. The Petitioner subsequently admitted that the recordings were accurate and authentic. (R.IV-389-390). Petitioner was arrested on April 23, 1982, seconds after he had given Amos a $6,500. "down payment" for the robbery and beating of Seifert. (R.IV-220-226).

The Petitioner testified in his own behalf and, as noted above, admitted having had the conversations with Amos but also testified that he believed that Amos was employed by Bob Denson, a private investigator hired by Seifert. Petitioner asserted the all too familar "conducting my own

---

[3] This was the arrangement ultimately agreed upon. In his earlier conversations with Amos, Petitioner had inquired about the possibility of having Seifert kidnapped and taken to Mexico and then imprisoned or killed.

investigation'' defense, which the Court will recognize as one frequently employed by criminal defendants and public officials caught up in undercover law enforcement operations. Petitioner testified that he continued to meet with Amos in the hope that he could connect Amos to Seifert through Denson. (R.IV-391-394). Petitioner testified that he gave Amos the ''down payment'' hoping to ''keep him involved in our situation for a later date.'' He testified that at the time he gave Amos the ''down payment'' he did not believe that Amos would actually harm Seifert and that he did not intent to have Seifert harmed. (R.IV-399-401).

However, the Petitioner's defense, however dubious on its face, became severely ''unraveled'' when, during its case in rebuttal, the State produced the testimony of Danny Wood. In 1982 Wood had operated a business specializing in dynamiting tree stumps. Wood testified that sometime in April of 1982, Petitioner had asked him to sell him some dynamite and told him that he wanted the explosives in order to blow up a 4,000 square foot building. Petitioner indicated that the owner of the building owed him $500,000. (R.IV-471-479). Apparently, Petitioner, who on cross-examination had denied meeting with Wood, neglected to mention his dealings with Wood to his trial counsel, who asked Wood no questions on cross-examination.

One other set of circumstances should be briefly mentioned since these facts are connected with Appellant's first three questions assigned for review. In March of 1982, immediately prior to the institution of formal police investigation of the Petitioner by Amos, the Petitioner's former business partner and the object of the aggravated robbery solicitation by Petitioner, Seifert, had learned from Joe McMurtrie, an auto glass installer who had worked for both

Petitioner and Seifert, that the Petitioner had called McMurtrie and requested his help in locating someone to "bump off" a person and to burn that person's place of business. (R.IV-15-23). Seifert then introduced McMurtrie to Clarence Robertson and Tim Falgout, who represented themselves to McMurtrie as being Dallas Police officers. Falgout and Robertson were in fact police officers, however they were also working for Seifert's private investigator, Denson, during their off-duty hours. After having lunch together, McMurtrie accompanied Falgout and Robertson to police headquarters. From this location McMurtrie placed a telephone call to Petitioner and his call was tape recorded. During the resulting conversation, McMurtrie told the Petitioner he had found a man to do the job and arranged for Petitioner to meet with the "hit man" (Sergeant Amos) the next day. (R.IV-25-29). The tape recording of this conversation was played for the jury. (R.IV-29-33).

At this point, Amos began the series of meetings with the Petitioner which ultimately resulted in Petitioner's arrest. Amos had become involved in the investigation after Falgout and Robertson had brought him the tape recorded telephone conversation between the Petitioner and McMurtrie. Amos then telephoned Petitioner and posing as the hit man, arranged to meet with Petitioner. (R.IV-72-90).

Although neither Robertson or Falgout testified at trial, Appellant complains that his rights under *Brady v. Maryland*, 373 U.S. 93, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), were violated because the trial court, after reviewing the Dallas Police Department's Internal Affairs Division's reports on the disciplinary actions taken against Falgout and Robertson, tendered to the court by the prosecutor prior to

trial, refused to permit the petitioner to have these materials. These materials show that when lead counsel for the State, Assistant District Attorney Jerry Banks, began preparing for the trial of Petitioner, he had met with Amos, Falgout and Robertson. Banks asked all three men if they had known anything relating to the case against the Petitioner prior to the time Falgout and Robertson had talked to McMurtrie. All three men denied such foreknowledge. Robertson and Falgout were prevaricating, since they had been working for Denson prior to this time in connection with Seifert's investigation of Petitioner. Upon learning that Robertson and Falgout had misrepresented their prior employment, Banks informed the Internal Affairs Division (IAD) of the Dallas Police Department. The IAD ultimately obtained written statements from Roberston and Falgout in which they admitted having worked for Denson. This private employment violated Dallas Police Department *policy* which prohibited police officers from working for private investigators. In addition, *any* outside employment by police officers was required to be approved by police department superiors and Robertson and Falgout had failed to seek any such permission. Although Petitioner characterizes the officers' conduct as "illegal," in fact, no State or Federal law was violated by their conduct, and the police department's prohibition of this type of outside employment was a policy of fairly recent origin.

Because of their multiple violations of departmental policies in working for Denson, many of which were totally unrelated to the investigation of the Petitioner, both Officers Falgout and Robertson were disciplined by suspensions from duty without pay, and reduction in rank. In addition, both officers were transferred out of the Department's Intelligence Division.

Significantly on direct examination at trial, Sergeant Amos testified concerning the disciplinary measures taken against Robertson and Falgout because their employment by Denson. Amos testified that both Falgout and Robertson had resigned from the Dallas Police Department rather than accept the disciplinary measures and had then gone to work for Denson as private investigators. Amos testified that he did not become aware of Falgout and Robertson's employment by Denson until well after the Petitioner's arrest. (R.IV-288-297). Amos was also cross-examined extensively on the subject by Petitioner's counsel. (R.IV-302-42).

———o———

REASONS FOR NOT GRANTING WRIT

I.

The Court of Appeals correctly concluded that the allegedly "exculpatory evidence" tendered by the prosecutor to the trial court was not material to Petitioner's defensive theory and that the facts which would have been established by such evidence were before the jury from another source. Because of the immateriality of the evidence in question, the instant case is an improper vehicle for a resolution of any "conflict" between the circuits, if such conflict exists, in that the Court of Appeals' legal conclusions are not in conflict with any known principles of constitutional law.

The Petitioner's first three questions all relate the alleged violation of his right to be provided with exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Petitioner claims that the trial court's refusal to permit him to examine the IAD's

file concerning Robertson and Falgout, after the file had been tendered to the trial court by the prosecutor in accordance with the procedures outlined in *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), deprived him of his rights under *Brady.*

The Court of Appeals, after reviewing all the documents in question, concluded that Petitioner was "not denied access to any evidence material to his defense." (Opinion at p. 5). As to Petitioner's claim that the internal affairs file was necessary to show "a conspiracy between Seifert and the district attorney's office to 'set up' Appellant." the Court of Appeals correctly held that this point was "without merit" because 1) the documents demonstrated that prosecutor Banks was in no way involved in the police investigation of the case against the Petitioner, 2) that Banks' action *after* learning of Falgout and Robertson's employment by Denson (i.e. informing the IAD was "inconsistent with appellant's allegation of a conspiracy," and 3) that Petitioner's "conspiracy" theory presented on appeal, was different from his defensive theory during trial. (Opinion at p. 6).

More importantly, the Court of Appeals correctly held that "evidence showing the relationship between Falgout, Robertson, Denson and Seifert, as well as the evidence describing Amos' role in the investigation was fully developed at trial." (Opinion at pp. 6-7).

Finally, the Court of Appeals correctly concluded, in light of Petitioner's conducting his own investigation defense, that the only real issue at trial was Petitioner's intent in meeting with Amos and whether the Petitioner "actually believed Amos would harm Seifert." The Pe-

titioner's allegation of the "conspiracy extending to the district attorney's office," said the Court, "is not only unsupported by the evidence but is immaterial to the question of that (Petitioner's) intent." (Opinion at p. 7).

While it is true that some of the information in the IAD file might have served to corroborate the impeachment of Falgout and Robertson if any such impeachment had been attempted, as the Court of Appeals noted, the testimony of Amos at trial fully developed the genesis of Falgout's and Robertson's involvement in the investigation of the case. Of greater importance is the fact that Falgout and Robertson were *not called as witnesses by either party.* Thus, the present situation is wholly unlike that presented in either *United States v. Bagley,* 473 U.S. —, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) or *Lindsey v. King,* 769 F.2d 1034 (5th Cir. 1985), in which the prosecution had withheld impeachment evidence concerning principle witnesses. *See, Lindsey,* at 1042. Rather, the Petitioner claimed that he was not allowed access to documents which might have corroborated impeaching evidence *already before the jury,* where such evidence might at most have resulted in impeachment of two *potential* witnesses who did not in fact testify at trial and whose existence and extent of involvement in the case was known to the Petitioner prior to trial.

To argue that the instant case presents a factual vehicle to test a proper standard to be used in determining the meaning of the term "material" to the defense of an accused in the context of a prosecutor's failure to disclose impeachment evidence, an issue only recently addressed by this Court in *Bagley,* is absurd.

Likewise, because there was no basis to conclude that any of the impeachment evidence tendered to the trial court by prosecutor in good faith compliance with *Agurs* was such that it 1) "might have effected the outcome of the trial," *Agurs,* at 104, 96 S.Ct. at 2397, 2) "created a reasonable doubt where one did not exist," *Id.* at 112, 96 S.Ct. at 2401, 3) was reasonably likely to have produced a different outcome at trial, *Bagley, supra,* 473 U.S. at —, 105 S.Ct. at 3384, *or* 4) was reasonably likely to affect "the judgment of the trier of fact," *Bagley,* 473 U.S. —, 105 S.Ct. at 3399. (opinion of Stevens, J.), any further review by this Court to determine a "legal standard" to measure the conduct of a prosecutor or a trial judge in tendering or reviewing legally exculpatory material should wait for a case where the accused can attempt to demonstrate that the "suppressed" evidence at least arguably falls within one of the above categories and was not before the jury from another source.

II.

The Court of Appeals correctly decided the Petitioner's double jeopardy claim on State procedural grounds. Even if this basis for the decision below was incorrect, the facts of the case clearly show that the trial court did not abuse its discretion in holding that the jurors in question were disabled, and therefore "manifest necessity" required the termination of Petitioner's first trial. Accordingly, Petitioner's double jeopardy rights were not violated in the instant case.

The precise nature of Petitioner's third and fourth questions is rather difficult to ascertain, except that the Petitioner is dissatisfied with the Court of Appeals' determination that his first ground of error below could be

disposed of on State procedural grounds (see opinion of Court of Appeals at p. 2), *i.e.*, that the petitioner's oral motion for a dismissal of the prosecution of double jeopardy failed to comply with the requirements of TEX. CODE CRIM. PROC. ANN. art. 27.05 (Vernon Supp. 1985) and § 27.06 (Vernon 1966) that such motions be in writing and verified, and thus was not preserved for review. Surely, the Texas Code's requirement that pleas of former jeopardy must be made in writing can present no constitutional issue since Federal Rule Crim. 12 (b), requires that this type of motion may be required to be in writing, at the option of the trial judge. Accordingly, the Court of Appeals correctly decided that petitioner had failed to comply with State procedural law in raising his double jeopardy claim. Appellant does not suggest that the written pleading rule does not serve a legitimate State interest or that it was applied to him in order to avoid review by this Court. *See, Sullivan v. Little Hunting Park,* 396 U.S. 229, 233-234, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969); *Henry v. Mississippi,* 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965). Nor is this a case where the State court has ignored Petitioner's procedural default.

By citation to *Robinson v. Wade,* 686 F.2d 298 (5th Cir. 1982), Petitioner may be focusing on a footnote in that case which criticized the Texas procedural rules concerning double jeopardy claims on the ground that because "facts concerning the special plea are determined in the course of the trial on the merits," that the special plea "is a mechanism for avoidance of reconviction, not retrial." *Robinson,* at 302, n. 3. However, in the instant case, following the unfavorable ruling by the trial court, Petitioner took no further action to protect himself from

retrial. Accordingly, Petitioner waived any such protections, and more to the point, any action by this Court would not serve to protect Petitioner's double jeopardy rights against a retrial.

Finally, whatever the procedural merits of the Petitioner's position, his petition presents an unlikely vehicle for relief since the merits of his double jeopardy claim are dubious at best. Petitioner conceded below that Texas law does not permit the return of a verdict by less than eleven jurors in a felony case. *See,* TEX. CODE CRIM. PROC. ANN. art. 36.29 (Vernon Supp. 1986) and 36.33 (Vernon 1981).[4] Petitioner did not challenge the constitutionality of this rule in the State courts, rather he asserted that the trial court had abused its discretion in finding that the two jurors in question were disabled in failing to consider grounds less drastic than the declaration of a mistrial.

As to the trial court's determination that the jurors were disabled, the trial court's determinations and perceptions in this regard must be given "great deference." *Hameed v. Jones,* 750 F.2d 154, 161 (1st Cir. 1984), *cert. denied,* 105 S.Ct. 2677, 86 L.Ed.2d 695; *Arizona v. Washington, supra,* 434 U.S. at 510, 89 S.Ct. at 832. In this context, it must be remembered that Petitioner, by his failure to object at trial, implicitly conceded that the cru-

---

[4] Thus if the trial court did not abuse its discretion in concluding that the jurors were disabled for an indefinite period of time, clearly the termination of Petitioner's first trial was a "manifest necessity" under the analysis of *Illinois v. Sommerville,* 410 U.S. 458, 464, 93 S.Ct. 1066, 1070, 35 L.Ed.2d 425 (1973), since any verdict rendered by less than eleven jurors would have been reversed on appeal.

cial eleventh juror was *at least temporarily* disabled. As to the suggestion that the trial court did not *consider* a remedy short of a mistrial, this claim is *refuted* by the record.

In addition, while not dispositive, Petitioner has not demonstrated any specific prejudice to him from the mistrial ruling. *Arizona v. Washington, supra,* 434 U.S. at 516, 98 S.Ct. at 835-836, n. 35.

III.

The Petitioner's ineffectiveness of counsel claim does not even facially present a federal question since Petitioner does not attempt to demonstrate the ineffectiveness of counsel resulted in any actual "prejudice" to the Petitioner as that term is defined in Strickland v. Washington.

Petitioner's contention that his counsel's failure to follow the Texas pleading requirements regarding a special plea asserting that his first trial was improperly terminated deprived him of effective assistance of counsel at trial, is utterly devoid of merit.

Under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), cited by Petitioner, in order to make out a successful ineffectiveness of counsel claim, an accused must demonstrate 1) that counsel's performance was deficient to the point that he was "not functioning as 'counsel'," and 2) that counsel's errors "prejudiced the defendant" to the extent that he was deprived of a fair trial, "a trial whose result was reliable." 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. An error by counsel, even if professionally unreasonable, does not warrant reversal if the error had no effect on the

judgment. 466 U.S. at 691, 104 S.Ct. at 2067, 80 L.Ed.2d at 696. In assessing the prejudice resulting from deficient performance by trial counsel a court should presume, absent challenge to the evidence on sufficiency grounds, "that the judge or jury acted according to law." 466 U.S. at 494, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

In the instant case, while the Court of Appeals resolved the double jeopardy issue on procedural default grounds, the trial court did not utilize these grounds in refusing Petitioner's special plea. Rather, the trial court correctly held that the jurors had become disabled. Because the Petitioner makes no claim concerning the correctness of this determination by the trial court, and because without such a showing Petitioner can not demonstrate a fulfillment of the "prejudice" component of the *Strickland* test, especially in light of the presumption that the trial court ruled correctly on the merits of his claim, his petition presents no basis for review of his conviction by this Court on ineffectiveness of counsel grounds. Because the Petitioner's first trial was terminated before *any* testimony was presented, it is unlikely that Petitioner could show any specific prejudice occasioned by the termination of that trial. *Arizona v. Washington, supra.*

CONCLUSION

For the reasons stated herein, the petition filed in this case should be denied.

Respectfully submitted,

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JEFFREY B. KECK
Assistant District Attorney
Appellate Section
Counsel of Record

Dallas County District Attorney
Dallas County Government Center
600 Commerce Street
Dallas, Texas 75202-4606
214-749-8910

October 8, 1986

/s/ JEFFREY B. KECK

APPENDIX

INDEX TO APPENDIX

	Page
STATUTORY PROVISIONS	App. 1
TRIAL COURT'S ORDER DECLARING MISTRIAL (Petitioner's First Trial)	App. 4

STATUTORY PROVISIONS

1) TEXAS CODE OF CRIMINAL PROCEDURE:

Art. 36.29. If a Juror Becomes Ill

(a) Not less than twelve jurors can render and return a verdict in a felony case. It must be concurred in by each juror and signed by the foreman. Except as provided in Subsection (b) of this section, however, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict; but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it.

(b) If alternate jurors have been selected in a capital case and a juror dies or becomes disabled from sitting at any time before the charge of the court is read to the jury, the alternate juror whose name was called first under Article 35.26 of this code shall replace the dead or disabled juror. Likewise, if another juror dies or becomes disabled from sitting before the charge of the court is read to the jury, the other alternate juror shall replace the second juror to die or become disabled.

(c) After the charge of the court is read to the jury, if any one of them becomes so sick as to prevent the continuance of his duty, or any accident of circumstance occurs to prevent their being kept together under circumstances under which the law or the instructions of the court requires that they be kept together, the jury shall be discharged.

(d) After the charge of the court is read to the jury, the court shall discharge an alternate juror who has not replaced a juror.

Art. 36.33. Discharge Without Verdict

When a jury has been discharged, as provided in the four preceding Articles, without having rendered a verdict, the cause may be again tried at the same or another term.

2) TEXAS PENAL CODE

§ 15.03. Criminal Solicitation

(a) A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

(b) A person may not be convicted under this section on the uncorroborated testimony of the person allegedly solicited and unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act on the solicitation.

(c) It is no defense to prosecution under this section that:

(1) the person solicited is not criminally responsible for the felony solicited;

(2) the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution;

(3) the actor belongs to a class of persons that by definition of the felony solicited is legally incapable of committing the offense in an individual capacity; or

(4) the felony solicited was actually committed.

(d) An offense under this section is:

(1) a felony of the first degree if the offense solicited is a capital offense; or

(2) a felony of the second degree if the offense solicited is a felony of the first degree.

§ 29.02. Robbery

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

§ 29.03. Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he:

(1) causes serious bodily injury to another; or

(2) uses or exhibits a deadly weapon.

(b) An offense under this section is a felony of the first degree.

ORDER DECLARING MISTRIAL

F82-85921 JV

THE STATE OF TEXAS IN THE 292ND JUDICIAL
VS. DISTRICT COURT
JOHN DONALD MASSOUD DALLAS COUNTY,
TEXAS

ORDER DECLARING MISTRIAL

On this the 6th day of July, 1983, it came to the attention of the Court that 2 of the 12 jurors empaneled in the above numbered and styled cause were disabled from sitting, leaving only 10 jurors to hear the case.

One juror testified that she was currently suffering from a condition of emotional anxiety and depression which would impair her and inhibit her from fully and fairly performing the functions of a juror.

Another juror testified that his brother had committed suicide in the early morning hours of July 6, 1983, and that he had just received notice of his brother's death before coming to the courthouse. He testified to the effect that his brother's death and the surrounding circumstances would impair him and inhibit him from fully and fairly performing the functions of a juror.

The Court discharged said jurors as disabled. Being improper for the trial to proceed with 10 jurors, it is proper to terminate this criminal trial after jeopardy has attached, since it is required by "manifest necessity" and the "ends of public justice." *See Schaffer v. State,* 649 S.W.2d 637, 638-639 (Tex. Crim. App. 1983) and cases cited therein.

A MISTRIAL, THEREFORE, IS HEREBY DECLARED in this cause.

/s/ Michael Keasler
Judge Presiding